FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-316

JOHN R. BATES and VAN O'STEEN,

Appellants,

v.

STATE BAR OF ARIZONA,

Appellee.

On Appeal From the Supreme Court of Arizona

BRIEF OF THE AMERICAN MEDICAL ASSOCIATION, AS AMICUS CURIAE, IN SUPPORT OF APPELLEE

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INTEREST OF AMICUS CURIAE

The American Medical Association is the largest voluntary national professional association of physicians.* Founded in 1846, the Association has a current membership of 215,000 physicians and serves as the representative of the medical profession in the United States and its Territories.

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* This brief is submitted by the American Medical Association, as *amicus curiae*, with the consent of all parties pursuant to Rule 42 of the Court.

The objects of the American Medical Association, as written into the Association's Constitution more than a century ago, are "to promote the science and art of medicine and the betterment of public health." The American Medical Association and its members are dedicated to fostering the advancement of medical science and the health of the American people. One of the important activities of the Association in furtherance of its objectives and purposes is the development of professional standards of conduct promulgated as the Principles of Medical Ethics.

This case will have a profound impact on the activities of the American Medical Association and its members in carrying out self-regulation to assure quality medical services and the integrity of the medical profession. The issues presented in this case involve important questions of constitutional law and public policy. The Court's interpretation of the relationship between the public's right to know and traditional restrictions on professional conduct will of necessity affect the ability of medical associations and state regulatory agencies to regulate certain conduct of physicians. Both as an Association interested in the promulgation of ethical standards of conduct and as a representative of its members, *amicus* has a substantial interest in preserving regulation of the professions in the public interest.

ARGUMENT

While the precise issue before the Court is the constitutionality of a state prohibition on price advertising by attorneys, this case raises the more fundamental question of how information concerning professional services can best be disseminated to the public consistent with the public interest. The decision of the Court will necessarily mandate general rules which will extend beyond the parties to all

institutions concerned about advertising or solicitation by professionals. This memorandum will, therefore, provide the perspective of the medical profession and will set forth the position of the American Medical Association. That position is contained in the Statement of the Judicial Council of the AMA regarding advertising and solicitation by physicians (April 9, 1976, attached hereto as Appendix A).

As the April 9 Statement of the Judicial Council recognizes, the public has a significant interest in receiving information about the availability of medical services. This information includes, *inter alia,* the following items:

1. The names of physicians;
2. The type of their practices;
3. The location of their offices;
4. Their office hours; and
5. The fees they charge, provided that disclosure is made of the variable factors that can affect such fees.

Dissemination of this information promotes informed choice of physicians by consumers and reasonable competition among physicians, two policies which the AMA has long supported. At the same time, however, the AMA opposes the serious dangers to the public welfare posed by unlimited advertising and solicitation by physicians.

One of these dangers is the potential for deception inherent in such advertising and solicitation. The First Amendment does not of course preclude prohibitions on false promotional statements. *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council,* 48 L.Ed. 2d 346, 364 (1976). Thus, a physician could be prevented from making the obviously misleading claim that his ineffective secret nostrums could cure a variety of serious diseases. But many forms of advertising and solicitation by physi-

cians involve not clear falsehoods, but subtle deception and adverse consequences to the public.

For example, the advertisement "Abdominal Problems Treated Without Surgery", even if true, may deceive the consumer into receiving inadequate medical care. The consumer, anxious about the potential seriousness of disquieting conditions and fearful of the pain and risks associated with surgery, is most vulnerable to promises of quick cures, painless remedies, or medically unjustified hopes held out by an advertiser who hasn't even conducted an individual examination.

And the consequences of deception may be horrible. By choosing the superficially appealing course prescribed by the huckster who promotes "Abdominal Problems Treated Without Surgery", a patient will forego the treatment that the ethical physician would have offered. In so doing, his condition might well worsen to the point that it becomes seriously aggravated or even incurable. In view of the vulnerability of consumers and the potentially tragic consequences of deception in this area, it is not unreasonable for a state to conclude that the public interest is best served by a clear, enforceable test proscribing certain easily-identifiable classes of professional advertising.

Take the case of price advertising at issue in this appeal. The difficulty of conveying complete information may well make an apparently truthful figure quite misleading. Thus, the average consumer will not recognize the ambiguities inherent in the claim, "Initial Office Visit—$50". Will that visit include twenty minutes with the physician—or five? Will that visit include a thorough examination or merely the taking of a history with instructions to return in a week? Will the advertised price include laboratory tests, or will

these procedures cost extra? Unless disclosure is made of the answers to these and similar questions, "truthful" advertising will give consumers very limited information at best and will more probably mislead them.

The charlatan will be quick to seize upon the lawfulness of this form of unrestricted price advertising because it permits him to offer bargains more apparent than real. The ethical practitioner will not advertise prices unless disclosure can be made of the pertinent factors affecting the amount of any fee specified. Thus, he or she would not advertise the delivery of a baby for $X without specifying whether the advertised fee included pre-natal and post-natal care, procedures necessitated by unforeseen complications, and similar factors.

In addition, price advertising may in borderline cases pressure the physician not to base the fee on the services performed but to base the services provided on the price advertised. Of course, if a physician determines that a blood test is necessary for the treatment of a patient, he will order the test regardless of any price he has advertised. If, however, the physician thinks that a blood test might be helpful but is not absolutely essential, he might hesitate to order the test where he has specified a price in advertising. And the foregoing of such a test might very well turn out to be contrary to the best medical interests of the patient.

As has recently been observed:

> "Price advertising may lead to deterioration in quality and professional ethics. The individual patient has little information on the quality of any particular physician's service. If quality information is too hard to specify and to obtain . . . then . . . too much price consciousness . . . may lead to price competition and lower quality in general. This type of price competition

> may even lead to deterioration of the ethical standards of the physician." Robert T. Masson and S. Wu, "Price Discrimination for Physicians' Services", 9 Journal of Human Resources 63, 73 (1974).

In short, price advertising can result in a decrease in the quality of care rendered to patients because in borderline cases it may lead to a standardization of service.

Or take the case of "truthful" testimonials. These are almost inevitably misleading because no two medical conditions are precisely alike. Even the most "routine" procedure, e.g. delivery of a baby, can sometimes involve serious complications. Thus, one person might quite honestly state that "Dr. Jones cured my problem in six weeks." But apart from the fact that the "cure" may be attributable to wholly natural causes and not to anything done by Dr. Jones, the fact that Dr. Jones cured one person in six weeks is irrelevant to what he can do for another person. The variety and complexity of symptoms, diseases and treatments make these sorts of testimonial likely to do no more than raise undue hopes in the minds of individuals. They raise the expectation that Dr. Jones will successfully treat all patients—even though the condition of any particular patient may be irremediable, not within the competence of Dr. Jones, or better handled by someone else.

Certain forms of advertising and solicitation, including unrestricted price advertising, tend to detract from the confidence which patients must place in physicians if medical care is to be effective. If the proper diagnosis is to be made, the patient must often trust the physician sufficiently to confide the most intimate details of his or her private life. Likewise, if a treatment is to be successful, the patient must often trust the physician sufficiently to follow a course of action which may be inconvenient, painful, and not immediately productive of observable results.

Physicians must constantly ask patients to submit to inconvenient, painful, and sometimes risky procedures. They must tell patients things which patients do not like to hear and often do not want to believe. Frequently, they treat patients who are upset and confused by undiagnosed and potentially serious symptoms and by procedures which are unknown and frightening to them. In these circumstances, treatment can only be effective if the patient is convinced that the physician is acting not out of commercial concerns but entirely out of a commitment to the welfare of his patient.

Trust is of course in large part a function of the individual physician and the individual patient. Through his character, action and judgment, a physician must earn the confidence of the patient. But trust is also a function of the esteem in which society holds physicians as a group. To the extent that "the public" perceives "physicians" as acting solely in the best medical interests of "patients", this relationship of trust is possible to attain. To the extent that the public perceives physicians as motivated primarily by profit maximization, this relationship becomes more difficult, if not impossible, to achieve. Harvard economist Kenneth Arrow put the point well when he wrote:

> "As a signal to the buyer of his intentions to act as thoroughly in the buyer's behalf as possible, the physician avoids the obvious stigmata of profit-maximizing. Purely arms-length bargaining behavior would be incompatible, not logically, but surely psychologically, with the trust relations. . . . The very word, 'profit', is a signal that denies the trust relations." K. Arrow, "Uncertainty and the Welfare Economics of Medicine", 53 Amer. Ec. Rev. 941, 965 (1963).

Thus, in order to promote effective medical care, society has an interest in discouraging practices which undermine the physician-patient relationship.

CONCLUSION

Medicine is a complex art based on often-not-well-understood scientific principles. Advertising in this highly sophisticated field raises considerations quite different from the advertising of consumer products and simple services. These considerations include a significant potential that some apparently truthful claims will mislead the ordinary consumer to his economic and physical detriment. They also include a substantial risk that some concededly non-deceptive statements can cause the quality of service rendered by physicians to deteriorate.

This memorandum has focused on advertising in the area of medicine, but the considerations discussed herein apply equally to the field of law. In proscribing unrestricted price advertising by attorneys in newspapers, the Arizona Supreme Court has weighed these considerations. It has also taken into account the difficulty of monitoring professional advertising and the availability of price information in media other than newspapers. The First Amendment should not prohibit a state from concluding that a clear, enforceable rule best serves the public interest.

In suggesting ethical standards for its members, the American Medical Association has taken a somewhat less restrictive approach (See Appendix A). But in the final analysis, the question is whether the First Amendment mandates any one solution to the problem of advertising by professionals. *Amicus* American Medical Association respectfully submits that the Constitution allows a range of choices. The need for more information to consumers is a real need, but it can be met by methods other than unrestricted advertising and solicitation. The Constitution does not require that millions of Americans be subjected to the risks of the marketplace without the protection of rigorous

state regulation and without standards of professional ethics.

Respectfully submitted,

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APPENDIX A

Statement of the Judicial Council [of the American Medical Association], Re: Advertising and Solicitation

This statement reaffirms the long-standing policy of the Judicial Council on advertising and solicitation by physicians. The *Principles of Medical Ethics* are intended to discourage abusive practices that exploit patients and the public and interfere with freedom in making an informed choice of physicians and free competition among physicians.

Advertising—The *Principles* do not proscribe advertising; they proscribe the solicitation of patients. Advertising means the act of making information or intention known to the public. The public is entitled to know the names of physicians, the location of their offices, their office hours, and other useful information that will enable people to make a more informed choice of physician.

The physician may furnish this information through the accepted local media of advertising or communication, which are open to all physicians on like conditions. Office signs, professional cards, dignified announcements, telephone directory listings, and reputable directories are examples of acceptable media for making information available to the public.

A physician may give biographical and other relevant data for listing in a reputable directory. A directory is not reputable if its contents are false, misleading, or deceptive or if it is promoted through fraud or misrepresentation. If the physician, at his option, chooses to supply fee information, the published data may include his charge for a standard office visit or his fee or range of fees for specific types of services, provided disclosure is made of the variable and other pertinent factors affecting the amount of the fee specified. The published data may include other relevant facts about the physician, but false, misleading, or deceptive statements or claims should be avoided.

Local, state, or specialty medical associations, as autonomous organizations, may have ethical restrictions on advertising, solicitation of patients, or other professional conduct of physicians that exceed the *Principles of Medical Ethics*. Furthermore, specific legal restrictions on advertising or solicitation of patients exist in the medical licensure laws of at least 34 states. Other states provide regulation through statutory authority to impose penalties for unprofessional conduct.

Solicitation—The term "solicitation" in the *Principles* means the attempt to obtain patients by persuasion or influence, using statements or claims that (1) contain testimonials, (2) are intended or likely to create inflated or unjustified expectations of favorable results, (3) are self-laudatory and imply that the physician has skills superior to other physicians engaged in his field or specialty of practice, or (4) contain incorrect or incomplete facts, or representations or implications that are likely to cause the average person to misunderstand or be deceived.

Competition—Some competitive practices accepted in ordinary commercial and industrial enterprises—where profit-making is the primary objective—are inappropriate among physicians. Commercial enterprises, for example, are free to solicit business by paying commissions. They have no duty to lower prices to the poor. Commercial enterprises are generally free to engage in advertising "puffery", to be boldly self-laudatory in making claims of superiority, and to emphasize favorable features without disclosing unfavorable information.

Physicians, by contrast, have an ethical duty to subordinate financial reward to social responsibility. A physician should not engage in practices for pecuniary gain that interfere with his medical judgment and skill or cause a deterioration of the quality of medical care. Ability to pay should be considered in reducing fees, and excessive fees are unethical.

Physicians should not pay commissions or rebates or give kickbacks for the referral of patients. Likewise, they should not make extravagant claims or proclaim extraordinary skills. Such practices, however common they may be in the commercial world, are unethical in the practice of medicine because they are injurious to the public.

Freedom of choice of physician and free competition among physicians are prerequisites of optimal medical care. The *Principles of Medical Ethics* are intended to curtail abusive practices that impinge on these freedoms and exploit patients and the public.

Journal of the American Medical Association, Vol. 235, No. 21, p. 2328, May 24, 1976